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10/645,771	08/21/2003	Philippe Briand	NONY 3.0-008	8763
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LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090			KAUFMAN, JOSEPH A	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/645,771
Filing Date: August 21, 2003
Appellant(s): BRIAND, PHILIPPE

MAILED

JUL 24 2006

Group 3700

George Ng
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/5/2006 appealing from the Office action mailed 6/13/2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

GROUND OF REJECTION NOT ON REVIEW

The following grounds of rejection have not been withdrawn by the examiner, but they are not under review on appeal because they have not been presented for review in the appellant's brief. The 112, 2nd paragraph rejection of claims 19, 26 and 27, copied in below section 9. Please see the footnote on page 20 acknowledging the 112, 2nd paragraph rejection and a proposed remedy.

Regarding the remaining issues, the appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,358,146 STULL 10-1994

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

Claims 19, 26 and 27 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 19, line 13, there is a lack of antecedent basis for the dispenser orifice. It is unclear if it is the same structure as the dispenser opening.

Claims 20, 22, 24, and 26 stand rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The fixed position of the orifice with respect to the second part is new matter as there is no basis for this feature in the original disclosure.

Claim Rejections - 35 USC § 102

Claims 1, 2, 4-11, 13, 14 and 16-27, as best understood stand rejected under 35 U.S.C. 102(b) as being anticipated by Stull '146.

Stull shows a first part 22 having a first surface seen in Figure 8; second part 24 having a second surface seen in Figure 8; opening 30, 36; there must be a small distance between the surfaces or the cap would not rotate; gap 38, 30; sector seen in Figures 1 and 5; top wall 40; opening 38 having an edge; end wall 41 having an edge; the orifice is eccentric on the top wall as seen in Figure 1; the surfaces are concentric as seen in Figure 6; extension as the top part of 22; closed top closed by cap 32; lateral opening 30; inner skirt 34; chamber as the opening 30, 36; axis of rotation seen in Figure 6; neck 22; a slight inclination/slope is inherent as a perfectly nested structure would be impossible; stops 42, 43; there are no check valves; the device is made of plastic as noted in column 4, line 30; sunscreen/lotion is a cosmetic which is discussed in column 3, line 9; part of the orifice (38) is in a fixed position on (i.e. independent of) the second part and the top surface of 40 would disperse some of the dispensed material.

Claim Rejections - 35 USC § 103

Claims 3, 12 and 15 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Stull.

Stull has been discussed above, but lacks the spacing being less than .5 mm, the rotation being a half turn, and the different colored plastics. It would have been obvious to make the spacing between the surfaces less than .5 mm in order to allow for rotation

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of the parts relative to each other while not permitting product to get between. The rotation being a half turn would have been obvious as the amount of rotation could be set to any distance that would permit for complete opening and closing of the outlet. Finally, the different colored plastics would have been obvious as aesthetic considerations are important in marketing a product.

(10) Response to Argument

Appellant's remarks regarding the dispenser surface receiving flow from the orifice has been found persuasive and the rejection of these claims under 112, 1st paragraph has been withdrawn.

Regarding appellant's arguments concerning the orifice being in a fixed position independent from the second part, the passages cited in the arguments do not support such a feature. There is no mention of such a relationship, nor can one be reasonably inferred.

Appellant further contends that Stull does not disclose the orifice as claimed in the invention. An orifice is defined in *Webster's New World Dictionary, Third College Edition*, as "a mouth, an aperture of a tube, cavity, etc.; opening". As discussed above, the orifice of Stull is discussed as the opening 30, 36 between the parts 22 and 24 (when they are aligned for dispensing). As this opening clearly meets the definition of an orifice, the claimed limitation is met. Appellant has not defined an orifice anywhere in the specification to only mean the exact exit point of the material as appellant appears to be arguing. Therefore, the orifice can have its ordinary meaning that is clearly supported by the dictionary definition. Further, appellant's arguments that Stull

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shows a different orifice than that shown or disclosed by appellant and appellant's orifice has advantage over other similar inventions are beyond the scope of the claims.

Appellant further argues that the orifice does not open "directly" into the environment. It is unclear how this assertion could be true. If the orifice did not open directly to the environment, the material would either not be dispensed or there would have to be some type of receiver for the material. Stull clearly shows the material being dispensed and no receiver. Therefore, the orifice opens directly to the environment. Once again, appellant is trying to define the orifice in a narrow manner not supported by the common definition and knowledge in the art.

Finally, regarding the obviousness rejections, appellant argues that the motivations provided by the examiner are not stated in the Stull reference. Implicit motivation is permissible. References do not provide a motivation for employing or contemplating every detail as many features are utilized for reasons well known or implicit in the art. Such motivation, while arguably different from that provided by appellant, is no less relevant or less appropriate to use. With reference to the change in colors, the different parts have areas viewable from the outside, so there clearly would be aesthetic considerations to make.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

 7/19/06

Joseph A. Kaufman

Primary Examiner

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Conferees:

Eric Keasel 

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